UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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CAROLINA CASUALTY INSURANCE COMPANY, a Florida Corporation,

Plaintiff,

v.

BOLLING, WALTER & GAWTHROP, a California Professional Corporation; THEODORE D. BOLLING, JR., a California resident; and DOES 1-50, inclusive,

Defendants.

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NO. CIV. S-04-2445 FCD PAN

MEMORANDUM AND ORDER

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This matter comes before the court on motion for summary judgment, pursuant to Fed. R. Civ. P. 56, filed by plaintiff, Carolina Casualty Insurance Co. ("CCIC"). Defendants, Bolling, Walter & Gawthorp ("BWG") and Theodore D. Bolling ("Bolling")(collectively "defendants"), oppose the motion and request dismissal or in the alternative a stay of the action.

For the reasons stated herein, plaintiff's motion is GRANTED and defendants request for dismissal or stay is DENIED.

BACKGROUND

This matter arises out of a dispute between an insurer and an insured over who has the right to determine the identity of legal counsel to represent the insured in a legal malpractice action pending in California superior court.

BWG is a professional law corporation, organized under the laws of California and based in Sacramento, California. (Defs.' Sep. Statement of Add'l Facts in Opp'n Summ. J. ("SAF") ¶ 1.)[1] Bolling is an attorney licensed to practice law in California, who is employed by BWG. (SAF ¶ 2.) CCIC is a corporation organized under the laws of the state of Florida, and is in the business of issuing policies of insurance. (SAF ¶ 5.)

CCIC issued a Lawyer's Professional Liability Policy to defendants for the period from August 18, 2003 to August 18, 2004. (Defs.' Resp. to Pl.'s Sep. Statement of Und. Facts ("Resp. SUF") ¶ 15.) Under the policy, CCIC is obligated to "pay on behalf of the Insured all Damages and Claims Expense[2] that the

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[1] The Eastern District Local Rules provide that a party opposing a motion for summary judgment may file an additional statement of disputed facts. Here, defendants do not specify whether the facts in the Separate Statement of Additional Facts are presented as disputed facts or undisputed facts. The substance of the facts suggests that they are offered as additional undisputed facts. For example, the parties do not dispute that "CCIC is in the business of issuing policies of insurance." (See SAF ¶ 6.)

[2] The CCIC policy defines "Claims Expense" as "reasonable and necessary fees, costs and expenses . . . resulting solely from the investigation adjustment, defense and appeal of a Claim against the Insureds, but excluding salaries, wages, overhead or (continued...)

Insured shall become legally obligated to pay, arising from any claim first made against an Insured during the Policy Period and reported to the Insurer in writing during the Policy Period or within 60 days thereafter for any Wrongful Act . . .." (Resp. SUF ¶ 16; CCIC Lawyers' Professional Liability Insurance Policy No. 96000832 / 1 (the "Policy"), Ex. D to the Dec. of Carol Weill in Supp. Summ. J. at 2.) Section VI of the agreement provides:

> A. An Insured shall not admit liability for, enter into any settlement agreement, stipulate to any judgment, agree to arbitration, or incur Claims Expense without the Insurer's prior written consent. The Insurer's consent shall not be unreasonably withheld, provided that the Insurer shall be entitled to full information and all particulars it may request in order to reach a decision regarding such consent. Any Damages and/or Claims Expense incurred and settlements agreed to prior to the Insurer giving its consent shall not be covered hereunder.
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> B. The Insurer shall have the right and duty to defend any Claim to which this insurance applies, even if any allegations of the Claim are groundless, false or fraudulent. The Insurer's right and duty to defend any Claim shall end when the Insurer's applicable Limit of Liability has been exhausted by payment of Damages and/or Claims Expense, or has been tendered to, or on behalf of, the Insured, or to a Court of competent jurisdiction.
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> C. Each Insured shall cooperate with the Insurer in the defense and settlement of any Claim, and in enforcing any right of contribution or indemnity against any person or organization that may be liable to the Insured, at no cost to the Insurer. Upon the request of the Insurer, the Insured shall submit to examination and interrogation, under oath if required by a representative of the Insurer, and shall attend hearings, depositions and trials, assist in effecting settlement, securing and giving evidence, obtaining the attendance of witnesses, as well as giving written

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[2](...continued)
benefit expenses associated with any Insured, or any amount covered by the duty to defend obligation of any other insurer." (Resp. SUF ¶ 18.)

> statement(s) to the Insurer's representatives, and meeting with such representatives for purposes of investigation or defense, all without charge to the Insurer.

(Resp. SUF ¶ 17; CCIC Policy at 5.) The policy provides that defendants have a deductible of $ 50,000.00. (Resp. SUF ¶ 20.) The deductible applies to "each and every claim," and CCIC is only liable "for the amount of Damages and/or Claims Expense arising from a Claim which is in excess of the deductible amount . . .." (Resp. SUF ¶ 19.) The insured "shall, upon written demand of the Insurer," pay the deductible within 30 days. (Resp. SUF ¶ 19.)

On or about June 23, 2003, Derek Vanacore ("Vanacore"), a former client of BWG and Bolling, filed a complaint against defendants in Sacramento County Superior Court (the "Vanacore action"). (Resp. SUF ¶¶ 1-5.) The complaint alleges causes of action for malpractice and breach of contract. (Resp. SUF ¶ 6.)

By letter dated April 21, 2004, BWG sent notice of the Vanacore action to Monitor Liability Managers, Inc. ("Monitor"), which is responsible for managing claims against CCIC's insureds. (Resp. SUF ¶ 7; April 21, 2004 letter from John Coleman to James Hill at 2, Ex. E to Weill Dec.) In the letter, BWG also states that "[we] . . . would like to defend ourselves for the time being and charge against our deductible at the rate of $175 per hour." (Id.)

By letter dated May 12, 2004, Monitor rejected defendants' request to defend themselves, stating that "Monitor would like to retain defense counsel to defend this

Claim." (Resp. SUF ¶ 8; May 12, 2004 from Melissa De Grazia to John Coleman, Ex. F to Weill Dec.) Monitor further stated that "[p]er the terms of the policy, Monitor has the right to defend any suit against the Insured seeking damages to which the Policy applies." (Id.) Defendants have continued to conduct their own defense in the Vanacore action. (SAF ¶ 21.)

On November 17, 2004, CCIC filed the instant complaint seeking a declaratory judgment that CCIC has a right to control the identity of defense counsel in the Vanacore action and is entitled to replace BWG with counsel of CCIC's choosing. (Comp. ¶ 24.) Alternatively, if the court does not grant CCIC's request for a declaratory judgment that it is entitled to replace BWG with counsel of its choosing, CCIC requests a declaratory judgment that it is not obligated to defend or indemnify defendants in the Vanacore action. (Comp. ¶¶ 6, 12.)

Defendants indicate that they "are unwilling to pay their $ 50,000.00 deductible to defend a frivolous claim." (Defs.' Mem. Opp'n Summ. J. ("Defs.' Opp'n") at 4.) Defendants contend that they are entitled to defend themselves, at least until their $ 50,000.00 deductible is exhausted. However, "in the unlikely event that Vanacore were to recover a judgment, BWG and Bolling would expect CCIC to pay the judgment on their behalf up to the policy limit." (Defs.' Opp'n at 4.)

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STANDARD

The Federal Rules of Civil Procedure provide for summary adjudication when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). One of the principal purposes of the rule is to dispose of factually unsupported claims or defenses. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

Where the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. See Celotex Corp., 477 U.S. at 323-24. The court must examine all the evidence in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence. See T.W. Elec. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987) (citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)). The evidence presented by the parties must be admissible. Fed. R. Civ. P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. See Falls Riverway Realty, Inc. v. City of Niagara Falls, 754 F.2d 49, 57 (2d Cir. 1985);

Thornhill Publ'g Co., Inc. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979).

ANALYSIS

I. Jurisdiction

Prior to reaching the merits, the court must address defendants' objections to this court's exercise of jurisdiction over plaintiff's complaint, which prays solely for declaratory relief.

The Declaratory Judgment Act provides, in relevant part,

> In a case of actual controversy within its jurisdiction, [subject to exceptions not applicable here] . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a). The Declaratory Judgment Act "was enacted to afford an added remedy to one who is uncertain of his rights and who desires an early adjudication without having to wait until he is sued by his adversary." Plum Creek Timber Co. Inc. v. Trout Unlimited, 255 F. Supp. 2d 1159, 1164 (D. Idaho 2003)(quoting Levin Metals Corp. v. Parr-Richmond Terminal Co., 799 F.2d 1312, 1315 (9th Cir. 1986).)

A lawsuit seeking federal declaratory relief must first present an actual case or controversy within the meaning of Article III, section 2 of the United States Constitution and must fulfill statutory jurisdictional prerequisites. Government Employees Ins. Co. v. Dizol, 133 F.3d 1220,

1222-1223 (9th Cir. 1998)(en banc)(citations omitted). The Declaratory Judgment Act does not itself confer federal subject matter jurisdiction but rather, there must be an independent basis for such jurisdiction. Staacke v. United States Secretary of Labor, 841 F.2d 278, 280 (9th Cir. 1988). Here, subject matter jurisdiction is properly predicated on diversity of citizenship. See 28 U.S.C. § 1332.

However, even when subject matter jurisdiction exists, the district court may, in the exercise of its discretion, decline to entertain the action. Dizol, 133 F.3d at 1223 (noting that the Declaratory Judgment Act is "deliberately cast in terms of permissive, rather than mandatory, authority.") There is "no presumption in favor of abstention in declaratory actions generally, nor in insurance coverage cases specifically." Id. (stating that "[w]e know of no authority for the proposition that an insurer is barred from invoking diversity jurisdiction to bring a declaratory judgment action against an insured on an issue of coverage.")

Defendants contend that this case does not satisfy Article III's Case and Controversy requirement because it is not yet ripe for judicial review. In addition, defendants ask this court to abstain from exercising jurisdiction over the matter under Brillhart v. Excess Ins. Co. of America, 316 U.S. 491 (1942).

A. Ripeness

The court first addresses defendants' contention that

the present controversy is not yet ripe for review because (1) defendants will not in any event surrender defense in the underlying action rendering any decision by this court moot, and (2) CCIC's second claim for a declaratory judgment that CCIC owes no duty to indemnify defendants, "is speculative and hypothetical in that any 'harm' to plaintiff as a result of the insureds' alleged breach of the cooperation clause cannot be determined until final disposition of the underlying tort action." (Defs.' Mem. Opp'n Summ. J. ("Opp'n") at 18.)

Initially, defendants' assertion that they will not surrender the defense in the underlying action does not render a declaratory judgment moot.[3] If this court finds and declares that CCIC has a right to control the defense of the Vanacore action and select defense counsel, and defendants thereafter refuse to surrender control of the defense, CCIC can use the judgment of this court as a defense in any later-filed coverage dispute. Thus, whether defendants actually surrender the defense does not render moot the present controversy.

Defendants' second ripeness argument also fails because CCIC has not moved for summary judgment as to its second, alternative claim for relief. By this motion, CCIC does not

[3] The court notes that this is not actually a "ripeness" argument. While both ripeness and mootness are constitutional case or controversy requirements, ripeness "refers to whether an action is unfit for review due to its prematurity, [whereas] the mootness doctrine focuses on what has happened since the action was initiated" which would eliminate the previously-live controversy between the parties. See 15 James Wm. Moore et al., Moore's Federal Practice ¶ 101.90 (3d ed. 2005.)

seek a judicial determination that the Policy's cooperation clause has been breached. Rather, it seeks only a determination that it is entitled to control the defense and the identity of defense counsel. This question presents a "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941); Hillblom v. United States, 869 F.2d 426, 430 (9th Cir. 1990). Accordingly, the court finds the case ripe for review.

B. Abstention

Defendants next contend that the court should use its discretion to decline jurisdiction over plaintiff's declaratory judgment action. Even when subject matter jurisdiction exists, the district court may, in the exercise of its discretion, decline to entertain an action for declaratory relief. Dizol, 133 F.3d at 1223. A court's decision to abstain from entertaining such a suit must be based on more than "whim or personal disinclination." Id. (quoting Public Affairs Associates v. Rickover, 369 U.S. 111, 112 (1962). The Ninth Circuit has concluded that the factors articulated in Brillhart v. Excess Ins. Co. of America, 316 U.S. 491 (1942), remain the "philosophic touchstone for the district court." Id. As summarized by the Ninth Circuit in Dizol, the relevant factors are:

> The district court should avoid needless determination of state law issues; it should discourage litigants

> from filing declaratory relief actions as a means of forum shopping; and it should avoid duplicative litigation. If there are parallel state proceedings involving the same issues and parties pending at the time the federal declaratory action is filed, there is a presumption that the entire suit should be heard in state court. The pendency of a state court action does not, of itself, require a district court to refuse federal declaratory relief. Nonetheless, federal courts should generally decline to entertain reactive declaratory actions.

Dizol, 133 F.3d at 1225 (internal quotations and citations omitted).

1. Avoiding Needless Decisions of State Law

When the sole basis for federal jurisdiction is diversity of citizenship, "the federal interest is at its nadir and the Brillhart policy of avoiding unnecessary declarations of state law is especially strong." Continental Cas. Co. v. Robsac Indus., 947 F.2d 1367, 1371 (9th Cir. 1991), overruled on other grounds by Dizol, 133 F.3d at 1227). However, the instant dispute does not require this court to decide novel questions of state law. To the contrary, the parties' dispute requires interpretation of the Policy. While this analysis is governed by state law, the principles of contract interpretation are well settled, and there is no state court currently in a position to rule on the matter.

2. Avoiding Forum Shopping and Duplicative Litigation

"The federal Courts should generally decline to entertain reactive declaratory actions." Dizol, 133 F.3d at 1225. The Ninth Circuit has explained that a "declaratory judgment action by an insurance company against its insured during the pendency of a non-removable state court action

presenting the same issues of state law is an archetype of what we have termed 'reactive' litigation." Robsac, 947 F.2d at 1372-1373. Here, CCIC's claim is not reactive as it does not present any of the same issues involved in the Vanacore action. In the latter case, the two causes of action are malpractice and breach of the legal services contract. By contrast, this complaint requires interpretation of an entirely different contract, the Policy issued to BWG by CCIC. The only direct impact the resolution of this case will have on the underlying litigation is the identity of defense counsel. This distinguishes the present case from the cases primarily relied on by defendants, American National Fire Ins. CO. v. Hungerford, 53 F.3d 1012 (9th Cir. 1995), overruled in part by Dizol, 133 F.3d at 1227, and Employers Reinsurance Corp. v. Karussos, 65 F.3d 796 (9th Cir. 1995), overruled in part by Dizol, 133 F.3d at 1227. Both Hungerford and Karussos involved coverage disputes which required for their resolution factual determinations in the underlying cases. See Hungerford, 53 F.3d at 1017 ("a declaratory judgment in this case would not terminate the existing controversy because 'the policy exclusions can be applied only in light of factual determinations that have not been made [by the state court]."); Karussos, 65 F.3d at 800 n.2 ("Plainly, such a determination could be made only after considering issues involved in the state court proceedings.").

Defendants cite Karussos for the proposition that it does not matter whether the same issues are involved in the

state and federal cases. Karussos stated that "Hungerford applies whether or not there is a similarity of issues." 65 F.3d at 801. CCIC correctly points out that this language is dicta because in Karussos there was similarity of issues. Moreover, the broad language from Karussos is inconsistent with the Ninth Circuit's more recent Dizol opinion, in which the court explained that "pendency of a state court action does not, of itself, require the district court to refuse federal declaratory relief." Id. at 1225. Rather, the presumption against exercising jurisdiction arises in cases where "there are *parallel* state proceedings *involving the same issues and parties* pending at the time the federal declaratory action is filed . . .." Id. (emphasis added). The broad dicta from Karussos would read out of the rule the requirement that the federal and state proceedings be parallel, involving the same issues and parties.

Moreover, Karussos' broad language would preclude district courts from entertaining coverage disputes whenever a liability claim was pending in state court. This too is inconsistent with Dizol, which provides that "there is no presumption in favor of abstention in declaratory actions generally, nor in insurance cases specifically. 'We know of no authority for the proposition that an insurer is barred from invoking diversity jurisdiction to bring a declaratory judgment a action against an insured on the issue of coverage.'" Id. (citing Aetna Cas. & Sur. Co. v. Merritt, 974 F.2d 1196, 1199 (9th Cir. 1992)). As a result, the court will follow the analysis set forth by the Ninth

Circuit in Dizol.

3. Judicial Economy

Finally, judicial economy clearly is served by this court's resolution of the instant dispute. The parties have fully briefed the merits of the case, and this court is prepared to rule thereon. If this court were to abstain, CCIC would be required to start over by filing a new complaint in state court, which would needlessly delay resolution of the issues presented, and would require the state court to expend time and resources becoming familiar with the factual and legal issues involved.

Because the Brillhart factors weigh heavily in favor of jurisdiction, the court will exercise its discretion to assume jurisdiction over the instant declaratory judgment action.[4]

II. Merits

CCIC contends that, based on California law and the terms of the Policy, it has the right to control the defense and select defense counsel. Defendants provide no argument whatsoever in opposition, apparently relying instead on their attack on jurisdiction. However, defendants assert, without legal support or argument, that they are entitled to

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[4] Defendants final jurisdictional argument, that this court cannot determine if defendants have breached the cooperation clause in the Policy until the underlying dispute is resolved, is not well taken. CCIC does not move for summary judgment on its alternative request for a declaration that defendants are in breach of the Policy's cooperation clause. Resolution of the issues properly before the court – whether CCIC has a right to control the defense and select defense counsel – is not contingent on the outcome of the Vanacore action.

control the defense of the Vanacore action until their $50,000.00 deductible is exhausted.

The court finds that the Policy provides CCIC with the right to select defense counsel and to control the litigation. First and most importantly, the Policy provides that "the Insurer shall have the *right and duty* to defend any Claim to which this insurance applies, even if any allegations of the Claim are groundless, false or fraudulent." Both parties agree that the Policy applies to the Vanacore action.[5] Thus, by the express terms the Policy, CCIC has a right and duty to defend the Vanacore action. The right and duty to defend affords an insurer the right to control the defense. See Safeco Ins. Co. v. Superior Court, 71 Cal. App. 4th 782, 787 (1999)("When the insurer provides a defense to its insured, the insured has no right to interfere with the insurer's control of the defense . . .")(citing Wright v. Fireman's Fund Ins. Companies, 11 Cal. App. 4th 998, 1024 (1992); Pruyn v. Agricultural Ins. Co., 36 Cal. App. 4th 500, 515-516 (1995)).

The remaining question is whether the right to control the defense also entitles CCIC to select defense counsel. While the Policy does not expressly state that CCIC has a right to select defense counsel, the right to control the defense generally includes the right to select defense

[5] While defendants note that the action is frivolous, they also acknowledge that, in the event Vanacore were to obtain a judgment against defendants, they would seek indemnification from CCIC.

counsel. See generally State Farm Mutual Automobile Ins. Co. v. Federal Ins. Co., 72 Cal. App. 4th 1422, 1429 (1999). A contrary rule would be inconsistent with the insurer's right to control the defense and would place the insurer in the untenable position of being financially liable, but powerless to ensure the claim is properly defended. See e.g., James Finley and Vanida Finley v. The Home Ins. Co. And Hawaii Ins. Guar. Ass'n, 90 Haw. 25, 31-32 n.9 (1998) ("Because of their financial stake in effective claims resolution, insurers have a contractual right to control their insureds' defenses . . .")(citations and internal quotations omitted); Davenport v. St. Paul Fire and Marine Ins. Co., 978 F.2d 927 (5th Cir. 1992)("Because the [insurance] company is footing the bill for the defense, and will be obligated to pay any judgment rendered . . ., it is clearly entitled to select the attorney and conduct the defense.")

Defendants' position that they have a right to defend themselves up to the amount of their $ 50,000.00 deductible defies a common sense reading of the insurance contract. According to defendants' interpretation, CCIC's right to control the defense would vest after the litigation process is well underway - after litigation strategy had been developed, discovery initiated or perhaps completed, and potentially adverse irrevocable decisions made to which the insurer would be bound. The contract yields no such interpretation.

Read as a whole, the Policy clearly envisions that

CCIC, and not defendants, will select defense counsel. The Policy provides that the insured "shall not . . . incur Claims Expense without the insurer's prior written consent." "Claims Expense" expressly includes attorneys fees. These Policy provisions clearly vest CCIC with authority over any claims-related expense, whether incurred before or after the deductible is exhausted. Thus, defendants cannot "charge [attorneys fees] against [their] deductible" without prior written approval. (Resp. SUF ¶ 7.)

Based on the foregoing, and in light of defendants' failure to submit any argument in opposition to CCIC's construction of the Policy terms, the court finds that there is no triable issue of fact and that, as a matter of law, CCIC is entitled to a declaratory judgment that CCIC has a right to control the defense of the Vanacore action and to select defense counsel.

CONCLUSION

For the foregoing reasons, CCIC's motion for summary judgment is GRANTED. The court decrees and declares as follows:

(1) Pursuant to the Policy, CCIC is entitled to control the defense of, and select defense counsel in, the Vanacore action, Sacramento County Superior Court case no. 03AS03501.[6]

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[6] CCIC requests a further declaration that "BW&G is required to cooperate with defense counsel and pay the new defense counsel until the $ 50,000.00 deductible is exhausted." (Pl.'s Mem. at 16.) CCIC does not provide any argument to

(continued...)

(2) Any expenses incurred by defendants to self-defend the Vanacore action, for which defendants did not receive prior written approval from CCIC, cannot be chargeable against defendants' deductible as "Claims Expenses" under the Policy.

IT IS SO ORDERED.

DATED: May 31, 2005

/s/ Frank C. Damrell Jr.
FRANK C. DAMRELL, Jr.
UNITED STATES DISTRICT JUDGE

[6](...continued)
support its request for either declaration. CCIC also requests a declaration that "the amounts incurred by BW&G in self-defending do not count towards the satisfaction of the deductible, as they were not consented to by CCIC." However, CCIC did not request this relief in the complaint. (See Complaint at 12.) Accordingly, the court makes no order as to these requests.